

1919.*Present: De Sampayo J. and Schneider A.J.*GALGAMUWA *v.* WEERASEKERA *et al.*

81—D. C. Anuradhapura, 724.

*Partition—Intervention after interlocutory decree for establishing a trust—
Separate action.*

Plaintiff claiming to be an heir of one Banda sought to partition a land as against the other heirs of Banda. The respondents, after interlocutory decree, sought to intervene, alleging that Banda held certain shares of the land in trust for them.

Held, that the respondents were entitled to establish the trust in this action.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Balasingham* and *Croos-Dabrera*), for first defendant, appellant.

A. St. V. Jayawardene (with him *Samarawickreme*), for respondents.

July 3, 1919. DE SAMPAYO J.—

This appeal involves a question of procedure in a partition action. The plaintiff brought this action to partition between himself and the six original defendants a land described in the first paragraph of the plaint. The title disclosed by him was traced to two persons named Loku Banda and Punchi Banda, who on June 6, 1893, obtained a Crown grant. The plaintiff and defendants are either heirs or purchasers under Punchi Banda, it being alleged that Loku Banda died intestate without issue and leaving his brother Punchi Banda as the sole heir. The District Judge, after inquiry, entered an interlocutory decree, and referred the matter of partition to a Commissioner in the usual course; but before the partition was completed, and before any final decree was entered, the respondents to this appeal came into the case and applied to intervene, and claimed a half share under somewhat peculiar circumstances. They stated that a certain land called Walauwewatta belonging to a lady, Tikiri Kumarihamy, who died intestate, leaving four children, namely, Tikiri Banda, Paranagama Kumarihamy, Loku Banda, and Punchi Banda, the two last named being the predecessors in title of the plaintiff and the original defendants. They further stated that Tikiri Banda and Paranagama Kumarihamy's interest in that land Walauwewatta came to the intervenients by right of inheritance.

There is no need to question the correctness of the title to the land Walauwewatta, but they go further and say that in the process of construction of a certain tank and irrigation works by the Crown the land Walauwewatta was submerged and became part of the tank and works so constructed, and that in consequence the Crown granted the land now in question to Loku Banda and Punchi Banda as compensation for the benefit of all the members of the family. Accordingly, they say that Loku Banda and Punchi Banda held the land in trust for themselves as well as other members of the family, in accordance with the rights they had to the land Walauwewatta. The District Judge, after hearing the first defendant, appellant, who objected to the application, allowed the respondents to intervene. The appeal is taken from that order, and it is contended that the District Judge should not have allowed this intervention at all, and that the respondents should have been relegated to a separate action for the purpose of establishing the trust and having their rights secured to them. In support of this contention the case of *Silva v. Silva*¹ was cited. That decision, if I may say so, is perfectly right. There, however, it was the plaintiff who had to establish a trust in his favour under the deed by which the defendant was vested with title. This Court, in view of the provisions of the Partition Ordinance, decided that the plaintiff not being a co-owner at the date of the action was not entitled to bring the action for partition. In this case it is not a question as to whether the partition action was originally rightly brought, but as to whether the respondents, who assert a right to certain interest in the land, should be allowed to come in to safeguard those interests. In the decided case the plaintiff by being thrown out was in no way prejudiced as to his substantial rights, because he could still bring a separate action to establish the trust and to have his share allowed him; but these respondents, if they were not allowed to intervene and the partition action went on, would no longer have been able to dispute the right of the parties to the action after final decree had been entered in this case. I can quite understand that, if the claim depended on any complicated questions, it would be inconvenient to have them decided in a partition action, and in such a case the proper course might be to suspend the partition proceedings until such questions were determined in a separate action, but in this case I do not see that the question the Court has to determine is anything but simple. I think the District Judge was right in adopting the course he did, and in allowing the intervention so as to determine the question in the same proceedings.

I would dismiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

¹ (1916) 19 N. L. R. 47.

1919.

DE SAMPAYO
J.

Galgamuwa
v.
Weerasekera